Supreme Court, U.S.
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No. 93-1097

In the Supreme Court of the United States

OCTOBER TERM, 1993

DANIELA CHESLEREAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

RICHARD M. EVANS
ALICE M. KING
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals and the Board of Immigration Appeals correctly applied the standards established in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), and *INS* v. *Elias-Zacarias*, 112 S. Ct. 812 (1992), when they affirmed the denial of petitioner's applications for asylum and withholding of deportation under 8 U.S.C. 1158(a) and 1253(h).

2. Whether petitioner was denied due process as a result of the exclusion of testimony by an unidentified witness regarding current conditions in Romania, and the administrative notice of government reports detailing the significant changes in the Romanian government that have occurred since petitioner's departure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is unpublished, but the judgment is noted at 1 F.3d 1240 (Table). The decision of the Board of Immigration Appeals (Pet. App. C1-C18) and the decision of the immigration judge (Pet. App. B1-B10) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1993. A petition for rehearing was denied on October 4, 1993. Pet. App. D1-D3. The petition for a writ of certiorari was filed on January 3, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Romania who was authorized to stay in the United States as a nonimmigrant visitor until October 15, 1989. Because she remained in the United States beyond that date, she was served with an order to show cause why she should not be deported. At the deportation hearing, petitioner conceded deportability but applied for asylum under 8 U.S.C. 1158 and for withholding of deportation under 8 U.S.C. 1253(h). Pet. App. A2.

Petitioner contended that she and her family had been persecuted under the former communist government of Nicolae Ceausescu because of her father's contacts with westerners. Pet. App. A2-A3. Petitioner claimed that her father was discharged from the Romanian army because he had friends from Germany, and that after her father was subsequently struck and killed by an automobile, Romanian officials failed to prosecute the responsible individual, which petitioner believed was part of a plot to kill her father because of his associations with westerners. *Id.* at B5-B6. Petitioner also claimed that demotions she and her husband received at work were attributable to her relation to her father, *id.* at B6-B7, and that after her mother immigrated to the United States, the police, on several occasions, questioned petitioner about why her mother left Romania and searched her home for western currency. *Id.* at B7. Finally, petitioner asserted that a friend told her she should leave or the same thing that happened to her father would happen to her. *Ibid.*

After petitioner testified about these matters at the deportation proceedings, she sought to introduce testimony by an unidentified witness who purportedly had knowledge of current conditions in Romania. Admin.

Rec. 93. Petitioner's counsel acknowledged, however, that the witness had not been in Romania since petitioner had left that country and had not been in Romania while petitioner lived there. The immigration judge excluded the testimony on the ground that it would be irrelevant hearsay, based on the acknowledgement by petitioner's counsel that the witness could not corroborate petitioner's testimony regarding her individual circumstances. *Ibid.*

The immigration judge denied petitioner's applications for asylum and withholding of deportation. The immigration judge explained that in order for petitioner to be eligible for the discretionary relief of asylum, she must establish that she is a "refugee"—*i.e.*, that she is unable or unwilling to return to Romania because of "persecution or a well-founded fear of persecution * * * on account of race, religion, nationality, membership in a particular social group, or political opinion." Pet. App. B4-B5; 8 U.S.C. 1101(a)(42)(A). The judge found that petitioner's "version of events" was "pure speculation on her part" supported by "no corroborating evidence," and that even if true, it did not support a finding of persecution within the meaning of the Act. Pet. App. B8.

The immigration judge also denied petitioner's application for withholding of deportation. The judge explained that to be entitled to such relief, petitioner would have to establish that there is a clear probability—that it is "more likely than not"—that she would be persecuted in Romania on account of her race, religion, nationality, membership in a particular social group or political opinion. Pet. App. B4; see *INS* v. *Stevic*, 467 U.S. 407, 424 (1984). Because petitioner had failed to establish eligibility for asylum, the immigration judge concluded that she necessarily failed to satisfy the more stringent

standard for withholding of deportation. Pet. App. B8-B9.[1]

2. The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. C1-C18. The Board reviewed the case de novo and found that the record evidence "does not demonstrate that [petitioner] was persecuted in the past or that a reasonable person in her circumstances would fear persecution in Romania." *Id.* at C4-C5.

The Board found no evidence that either the dismissal or the death of petitioner's father was "on account of" one of the grounds enumerated in 8 U.S.C. 1101(a)(42). Pet. App. C5-C6. It further reasoned that even if the Romanian government was responsible for her father's death 12 years earlier, petitioner "ha[d] not shown that the Romanian government ever sought or presently seeks to persecute her because of her relationship to her father or any one of the five grounds proscribed by the Act." *Id.* at C7. The Board concluded in this regard that any demotions of petitioner and her husband were not "persecutory" within the meaning of the Act, both because she had not shown that they were invidiously motivated, and because petitioner and her husband had not been precluded from obtaining the basic necessities of life. *Id.* at C7-C8. The Board also found that petitioner "was never physically harmed or mistreated in any way by the Romanian government during her residence there," but rather was able to attend four years of college, obtain a professional position as an economist, and enjoy steady employment for four years until she resigned. *Id.* at C8-C9. It noted as well that petitioner had not been politically active in Romania, and

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[1] The immigration judge granted petitioner the privilege of voluntary departure in lieu of deportation. Pet. App. B9. The Board authorized voluntary departure as well. *Id.* at C17-C18.

had never openly expressed any views contrary to those of the former Ceausescu regime. *Id.* at C9.

The Board also found no evidence that petitioner's mother had ever been mistreated by the Romanian government. It reasoned that any questioning of petitioner or search of her home for foreign items after her mother's departure did not support a finding of persecution on an enumerated ground absent proof of an underlying invidious motive. *Id.* at C9-C10 (citing *INS* v. *Elias-Zacarias*, 112 S. Ct. 812 (1992)).

The Board further observed that even if it were inclined to conclude otherwise, "current political conditions in Romania render[ed] [petitioner's] reported fears of persecution anything but 'well-founded.'" Pet. App. C10-C11. The Board took administrative notice of the political changes that had taken place in Romania since petitioner's departure in April, 1989, *id.* at C11-C13,[2] and concluded that petitioner had "presented no evidence that the present government in Romania presently is, or ever will be, interested in persecuting [petitioner] for any reason." *Id.* at C14. Although it acknowledged the documentary evidence of internal unrest in Romania

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[2] The Board described the findings in the 1990 and 1991 State Department *Country Reports*, which are included in the record. See Admin. Rec. 22-29 (State Dep't Report to Senate Comm. on Foreign Relations and House Comm. on Foreign Affairs, 102d Cong., 1st Sess., *Country Reports on Human Rights Practices for 1990* (Joint Comm. Print 1991); State Dep't Report to Senate Comm. on Foreign Relations and House Comm. on Foreign Affairs, 102d Cong., 2d Sess., *Country Reports on Human Rights Practices for 1991* (Joint Comm. Print 1992)). The Board pointed to the overthrow of Ceausescu, the dissolution of the former secret police, the holding of multiparty elections, the emergence of a new coalition government, and the adoption of a new constitution. Pet. App. C10-C13.

submitted by petitioner, the Board found that such information did not relate to petitioner's particular circumstances and did not support her asylum claim. *Id.* at C14-C15. The Board rejected petitioner's request that the case be remanded for inclusion of testimony by the unnamed witness about current conditions in Romania. *Id.* at C15. The Board disagreed with the immigration judge's view that the testimony was irrelevant, but it concluded that there was no reason to remand the case because petitioner had not made an offer of proof that the testimony "would have changed the outcome of the case or that it would have been any different from the information contained in the *Country Reports*." *Id.* at C15-C16.

Finally, the Board held that even if it assumed that petitioner had experienced past persecution in Romania, or that at the time she left or for a time thereafter she had a well-founded fear of persecution should she return, a grant of asylum would not be warranted. Pet. App. C16. It found that the record did not provide any humanitarian or compelling basis to warrant a grant of asylum where it did "not find that a well-founded fear of persecution presently exists were [petitioner] to return to Romania." *Id.* at C17. Because petitioner failed to meet the standard for asylum, it necessarily followed in the Board's view that she failed to meet the higher standard for withholding of deportation. *Ibid.*

3. The court of appeals affirmed by unpublished order. Pet. App. A1-A10. It noted that to reverse the Board's determination, it would have to find "that the evidence not only supports a contrary conclusion, but indeed *compels* it." *Id.* at A5 (quoting *Klawitter* v. *INS*, 970 F.2d 149, 152 (6th Cir. 1992)). The court found that the record did not compel such a conclusion because it was not clear that either of petitioner's parents, petitioner's

husband, or petitioner herself was persecuted by the former government in Romania, and it was not clear that petitioner's father was killed because of his "race, religion, nationality, membership in a particular social group, or political opinion." Pet. App. A6.

The court of appeals rejected petitioner's argument that the Board had created a novel legal standard by stating that she had failed to prove that her treatment was "invidiously motivated." The court of appeals pointed out that under *INS* v. *Elias-Zacarias*, 112 S. Ct. 812, 816-817 (1992), and the Sixth Circuit's own decision in *Klawitter*, "the requirement that persecution or the fear of persecution be 'on account of' a ground listed in § 1101(a)(42)(A) makes motive 'critical' to the analysis." Pet. App. A7. Thus, in context, it read the Board's finding that petitioner had not demonstrated that the past incidents she alleged were "invidiously motivated" to mean that she had not demonstrated that the incidents were "on account of" one of the criteria listed in the statute. *Ibid.*

The court of appeals also concluded that petitioner's allegations failed to show a well-founded fear of future persecution, especially since "the political environment in Romania had improved." Pet. App. A7-A8. The court rejected petitioner's contention that she was denied due process because a witness was not allowed to testify about the general conditions in Romania, concluding that "the disputed findings were clearly secondary to the Board's finding that Cheslerean had not been persecuted in the past and that she did not have a well-founded fear of future persecution based on an enumerated ground." *Id.* at A8. Further testimony about the general conditions in Romania, the court concluded, "would not have enabled her to meet that test." *Ibid.*

The court of appeals recognized that in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987), this Court held that an asylum applicant need not prove that it is more likely than not that she will be persecuted in order to establish a well-founded fear of persecution. It found, however, that there was no indication that the Board had required petitioner to meet such a standard, but rather it had simply found no evidence that the present government of Romania is or ever will be interested in persecuting her. Pet. App. A9.

Finally, the court of appeals agreed with the Board's denial of withholding of deportation. Because petitioner failed to meet the asylum standard, the court concluded that she could not meet that more stringent standard for withholding of deportation. Pet. App. A10.

ARGUMENT

1. Petitioner contends (Pet. 12-14, 19-22) that the court of appeals' opinion is inconsistent with this Court's opinions in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), and *INS* v. *Elias-Zacarias*, 112 S. Ct. 812 (1992).[3] Petitioner also contends (Pet. 16-18) that the court of appeals applied an incorrect standard to determine whether she established that she had a "well-founded fear of persecution" if she returns to Romania.

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[3] Petitioner also asserts (Pet. 12), without analysis, that the decision below conflicts with the Sixth Circuit's prior decision in *Doe* v. *INS*, 867 F.2d 285 (6th Cir. 1989). In denying rehearing, however, the court of appeals rejected petitioner's contention that the Board's decision was inconsistent with *Doe*, pointing out that "detailed and credible evidence" supported the reasonableness of the applicant's fear of persecution in that case, while "no comparable evidence" was presented in this case. Pet. App. D2-D3. In any event, an alleged intra-circuit conflict is not a basis for review by this Court.

Petitioner misreads the court of appeals' discussion of *Cardoza-Fonseca*. The court of appeals did not find that the Board failed to apply the test of "well-founded fear under *Cardoza-Fonseca*," as petitioner contends (Pet. 13). Rather, the court found that the Board, in rejecting petitioner's asylum claim, had not held petitioner to the more stringent "more likely than not" test that is applicable to withholding of deportation claims under *Stevic* but was rejected by *Cardoza-Fonseca* for asylum claims. See Pet. App. A9. The court of appeals then pointed out that the Board simply found that petitioner presented no evidence that the current government of Romania is or ever would be interested in persecuting her. *Ibid.*[4] Thus, petitioner failed to establish a well-founded fear of persecution.[5]

Petitioner errs in contending (Pet. 16-17, 19) that the court of appeals introduced a novel concept into the law by using the phrase "persecution per se." See Pet. App. A6. That phrase merely reflected the court's conclusion that the alleged demotions of petitioner and her husband and the search of her home did not inherently rise to the level of "persecution" contemplated by the Act. The Board specifically found that petitioner had not established that she and her husband had been precluded from substantial employment or from the means to obtain the basic necessities of life. *Id.* at C8. Thus, petitioner's

[4] The Board did not "ignor[e] *Cardoza-Fonseca*," as petitioner asserts (Pet. 19). The Board cited *Cardoza-Fonseca*, as well as the Court's more recent decision in *Elias-Zacarias*, in support of its ruling. See Pet. App. C4-C5, C7, C10.

[5] The court of appeals, the Board, and the immigration judge correctly applied the more stringent "more likely than not" test only to petitioner's application for withholding of deportation under 8 U.S.C. 1253(h). See *Cardoza-Fonseca*, 480 U.S. at 423; *Stevic*, 467 U.S. at 410.

suggestion that her loss was comparable to "deprivation of liberty, food, housing, employment or other essentials of life" (Pet. 17) is contrary to the Board's factual findings.

Moreover, the Board and the court of appeals both correctly applied *Elias-Zacarias* when they rejected petitioner's claims in part because she presented no evidence that any of the actions she alleged—assuming each could be attributed to the Romanian government—was motivated by one of the factors addressed by the Act. In *Elias-Zacarias*, the Court held that the asylum applicant had failed to establish eligibility for asylum under 8 U.S.C. 1158(a), because he had not demonstrated that he feared persecution "on account of" his political opinion. The Court reasoned that a showing of a generalized political motive underlying the actions was not sufficient; rather the applicant must show that he holds a particular political opinion and that he has a "well-founded fear" that others will persecute him "*because of*" that political opinion. 112 S. Ct. at 816. Contrary to petitioner's contention (Pet. 17, 20), there is no basis for distinguishing *Elias-Zacarias* as a case involving a "political refugee." Petitioner's allegations of refugee status in this case also were politically based, and, in any event, nothing in *Elias-Zacarias* suggests that applicants claiming persecution on the basis of the other factors listed in Section 1101(a)(42) do not have to meet the same standard of showing that the persecution feared is persecution "*because of*" that factor. See *Elias-Zacarias*, 112 S. Ct. at 816.[6]

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[6] The court of appeals correctly read the Board's finding that petitioner had not demonstrated that the alleged incidents were "invidiously motivated" to mean that she had not demonstrated

2. Petitioner asserts (Pet. 14-16) that she was denied due process as a result of the immigration judge's exclusion of testimony and the Board's taking administrative notice of the change in the Romanian government.

Petitioner was not denied due process at her deportation hearing by the immigration judge's determination not to hear testimony about current conditions in Romania from an unnamed witness who had not been in Romania when petitioner was there and had not been in Romania since petitioner had left. The Board pointed out that petitioner had not made an offer of proof that the excluded testimony "would have changed the outcome of the case or that it would have been any different from the information contained in the *Country Reports*." Pet. App. C16. Moreover, petitioner's counsel acknowledged at the hearing that the witness could not have corroborated petitioner's testimony. Admin. Rec. 93.

Contrary to petitioner's assertion that "[t]he taking of administrative notice appears to have been improper" (Pet. 15), it is well settled under the authorities petitioner herself cites (*ibid.*) that the Board has authority to take administrative notice of a change of government abroad and other commonly acknowledged facts, including current events bearing on an asylum applicant's well-founded fear of persecution. See *Rivera-Cruz* v. *INS*, 948 F.2d 962, 966-967 (5th Cir. 1991); *Kapcia* v. *INS*, 944 F.2d 702, 705 (10th Cir. 1991). The Board's consideration of changed conditions is supported by the statute and companion regulations, 8 U.S.C. 1158(b); 8 C.F.R. 208.24, as is the reliance on country reports and other information reported by the Department of State, 8 C.F.R. 208.11, 208.12. Given petitioner's predominant focus on

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that the incidents were based upon—"on account of"—one of the factors listed in 8 U.S.C. 1101(a)(42). Pet. App. A7.

her fear of the former regime in Romania, the Board did not err in considering petitioner's claims in light of the undisputed fact that the former regime was no longer in control in Romania.

Finally, the court of appeals pointed out that the Board's findings about the current conditions in Romania "were clearly secondary to the Board's finding that [petitioner] had not been persecuted in the past and that she did not have a well-founded fear of future persecution based on an enumerated ground." Pet. App. A8. Thus, regardless of any change of conditions in Romania, the record clearly does not compel the conclusion that petitioner has a well-founded fear that she will be persecuted if she returns to Romania.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

RICHARD M. EVANS
ALICE M. KING
Attorneys

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